

BEFORE THE STATE BOARD OF TAX APPEALS  
STATE OF ARIZONA  
100 North 15<sup>th</sup> Avenue - Suite 140  
Phoenix, Arizona 85007  
602.364.1102

KIM M. ELLIOTT;  
J&K POSTAL WORKS, LLC

Appellant,

vs.

ARIZONA DEPARTMENT OF REVENUE,

Appellee.

) Docket Nos. 1937-05-S(5)  
) 1938-05-S(4)  
)  
)

) NOTICE OF DECISION:  
) FINDINGS OF FACT AND  
) CONCLUSIONS OF LAW  
)  
)

The State Board of Tax Appeals, having considered all evidence and arguments presented, and having taken the matter under advisement, finds and concludes as follows:

FINDINGS OF FACT

Appellant, Kim M. Elliott dba J&K Postal Works and J&K Postal Works, LLC collectively,<sup>1</sup> is engaged in the business of installing, repairing, removing, and relocating cluster mailboxes and delivery collection box units for the United States Postal Service as well as for private individuals. The mailboxes are provided by and remain the property of the Postal Service or private individuals. Appellant installs the mailboxes by bolting the mailbox unit to anchor bolts set in the ground. When installing a new mailbox, Appellant, or a concrete contractor hired by Appellant, sometimes must pour the concrete pad in which the anchor bolts are imbedded when installing a mailbox in a new location. This, at times, requires Appellant to level the ground prior to pouring the concrete pad. When Appellant removes, relocates and/or replaces a damaged or obsolete unit, it unbolts the unit from the anchor bolts. If no replacement mailbox is installed, Appellant generally breaks off the protruding portion of the anchor bolts with a

<sup>1</sup> Appellant originally ran the business as a sole proprietorship, but formed a limited liability company to run the business in August of 2002.



1 hammer and grinds away any remaining portion of the anchor bolts that protrude above the surface of the  
2 concrete pad when necessary. Appellant also repairs and replaces defective parts such as doors and  
3 hinges and replaces and maintains locksets.

4 The Arizona Department of Revenue (the "Department") audited Appellant for the period July 1,  
5 1995 through April 30, 2003<sup>2</sup> and assessed it additional transaction privilege tax under the prime  
6 contracting classification and penalties for failure to pay taxes due on behalf of the State and the cities of  
7 Cave Creek, El Mirage, Gilbert and Litchfield Park. Appellant timely protested the assessment to the  
8 Office of Administrative Hearings ("OAH"). OAH waived the penalty and granted Appellant additional time  
9 to demonstrate the portion of its receipts attributable to minor repairs and lock changes but otherwise  
10 upheld the assessment. Appellant did not submit any further documentation or evidence on this issue.  
11 Appellant now timely appeals to this Board.<sup>3</sup>

#### 12 DISCUSSION

13 The issue before the Board is whether Appellant is liable for the tax assessed under the prime  
14 contracting classification.

15 A.R.S. § 42-5075(K)(2) broadly defines a "contractor" as follows:

16 "Contractor" is synonymous with the term "builder" and means any  
17 person, firm, partnership, corporation, association or other organization .  
18 . . . that undertakes to . . . or does personally or by or through others,  
19 construct, alter, repair, add to, subtract from, improve, move, wreck or  
20 demolish any building, highway, road, railroad, excavation, manufactured  
21 building or other structure, project, development or improvement, or to do  
22 any part of such a project . . .

23 A "[p]rime contractor is a contractor who supervises, performs and coordinates the construction,  
24 alteration, repair, addition, subtraction, improvement [or] movement . . . and who is responsible for the  
25 completion of the contract." *Id*(K)(6). Relying on *Arizona Dep't of Rev. v. Arizona Outdoor Advertising,*  
*Inc.*, 202 Ariz. 93, 41 P.3d 631 (App.2002), Appellant maintains that it is not a contractor but is engaged in  
the nontaxable installation, repair and relocation of *personal property*.

<sup>2</sup> Kim M. Elliott (dba J&K Postal Works) was audited for the period July 1, 1995 through August 31, 2001, and J&K Postal Works, LLC was audited for the period September 1, 2001 through April 30, 2003.

<sup>3</sup> At the hearing before this Board, Appellant was again granted additional time to provide this documentation but failed to do so.



1 In *Arizona Outdoor* the issue was whether leasing billboards is taxable under the *commercial*  
2 *lease classification* for real property. See A.R.S. § 42-5069. "[R]eal property," under that classification,  
3 "includes any improvements, rights or interest in such property." Thus, the court had to determine  
4 whether the billboards constituted personalty or improvements to real property. In its discussion on the  
5 permanency of improvements to real property, the court cited the prime contracting case, *Brink Electric*  
6 *Construction, Co. v. Arizona Dep't of Rev.*, 184 Ariz. 354, 908 P.2d 421 (App. 1995). *Brink* addressed  
7 whether electrical transmission equipment was a *permanent* accession to realty and therefore taxable  
8 under the prime contracting classification, which includes the installation of machinery, equipment or  
9 other tangible personal property that becomes *permanently attached to real property*. A.R.S. § 42-  
10 5075(B)(7). The *Arizona Outdoor* court ultimately determined that the billboards were not permanent  
11 improvements (i.e., "fixtures"); therefore, leasing them was not taxable under the *commercial lease*  
12 *classification*. 202 Ariz. at 102. Based on this decision, Appellant argues that the prime contracting  
13 classification is limited to builders who enhance the value of or permanently improve real property. This is  
14 not the case.

15 In a recent unpublished memorandum decision, the Arizona Court of Appeals addressed the  
16 scope of the contracting classification and the significance of the *Arizona Outdoor* decision in determining  
17 whether activities constitute contracting. See *Cabazon Cable of America v. Ariz. Dep't of Rev.*, (Aug. 5,  
18 2002), No. TX2001-000229. The taxpayer in *Cabazon* installed cable television services and performed  
19 service repairs.<sup>4</sup> It claimed it was not a contractor because its "manufacture of personal property" did not  
20 qualify as an improvement under *Arizona Outdoor*. The court concluded that *Cabazon's* activities fell  
21 within the scope of the statutory definition of contractor. It further stated that the *Arizona Outdoor*  
22 decision applied to the commercial lease classification, not the prime contracting classification.

23 The broad prime contracting classification is not limited to fixtures or improvements to real  
24 property. The Board finds that Appellant's activities "alter, repair, add to, subtract from, improve [or] move  
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<sup>4</sup> *Cabazon's* activities included placing its conduits with other utility lines in trenches that had been previously excavated by contractors, pulling cable through the conduits, setting pedestal boxes for storing electronics, and activating the electronics. *Cabazon's* work also required it to dig trenches – sometimes through sidewalks or asphalt.



... [an] excavation ... project ... or improvement. A.R.S. § 42-5075(K)(2). Therefore, Appellant is liable for the tax assessed.

CONCLUSIONS OF LAW

Appellant is liable for the tax assessed. See A.R.S. § 42-5075(K); (*Cabazon Cable of Arizona, Inc. v. Arizona Dep't of Rev.*, 1 CA-TX 04-0002 (Aug. 30, 2005).

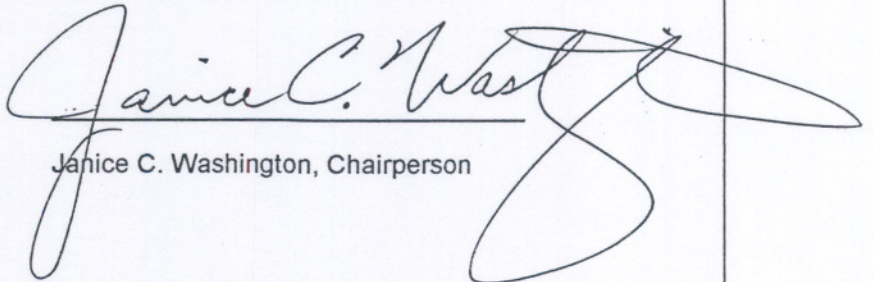
ORDER

THEREFORE, IT IS HEREBY ORDERED that the appeal is denied, and the final order of the Office of Administrative Hearings is upheld.

This decision becomes final upon the expiration of thirty (30) days from receipt by the taxpayer, unless either the State or taxpayer brings an action in superior court as provided in A.R.S. § 42-1254.

DATED this 20<sup>th</sup> day of June, 2006.

STATE BOARD OF TAX APPEALS



Janice C. Washington, Chairperson

JCW:ALW

CERTIFIED

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